IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. YUNNEL PERAZA-CABRERA and JUAN FRANCISCO PEREZ-BORQUEZ, Defendants.	MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTION TO SUPPRESS Case No. 2:04CR00164 W

This matter is before the court on Defendants' Motion to Suppress. On May 3, 2004, the court conducted an evidentiary hearing on the motion. Defendant Yunnel Peraza-Cabrera ("Cabrera") was present with his counsel, Viviana Ramirez. Defendant Juan Francisco Perez-Borquez ("Borquez") was present with his counsel, Robert Breeze. The government was represented by Vernon Stejskal. Following the hearing, the court ordered a transcript as well as supplemental briefing from the parties. After thorough review and consideration of the pleadings submitted by the parties and the testimony presented at the evidentiary hearing on the motion to suppress, the court enters the following memorandum decision and order.

BACKGROUND

The court finds the relevant facts as follows.[1] Officer Mikal Wersland and Officer Ron

[1]Reference to the transcript of the evidentiary hearing conducted on May 3, 2004, will be cited as "Tr. at __."

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Lance are police officers with the South Salt Lake Police Department, assigned to narcotics enforcement. (Tr. at 6, 62-63.) Officers Wersland and Lance have completed extensive training in drug investigations and drug interdiction. (Tr. at 7, 63.) On March 12, 2004, Officers Wersland and Lance were on routine patrol, checking certain hotels in the city that are notorious for criminal and drug activity. (Tr. at 8, 64.) As part of this routine patrol, the officers traveled to the Intown Suites hotel located at 44 West 3300 South in South Salt Lake. (Tr. at 8.) Officer Wersland testified that the officers were "constantly in contact" with the security manager at the Intown Suites concerning drug activity on the premises. Officer Wersland testified that just a few days prior to the incident in this case, officers had removed a "meth lab" from one of the hotel rooms. (Tr. at 8.) On prior occasions, Officer Wersland had witnessed drug transactions in the parking lot, and he had specific knowledge of numerous arrests made for drug possession and distribution at that location. (Tr. at 8-9.)

On March 12, 2004, Officers Wersland and Lance were planning to "look for any suspicious activity," check license plates, and visit with the security manager. (Tr. at 9.) The officers proceeded toward the Intown Suites, heading eastbound on 3300 South in an unmarked Jeep Cherokee.[2] (Tr. at 9, 65.) Upon arriving at the Intown Suites, the officers pulled into the left-turn lane, waiting for westbound cars on 3300 South to pass so they could enter the south entrance/exit to the hotel. (Tr. at 9.) At approximately 10:00 p.m., while waiting in the turn lane, the officers noticed a red vehicle traveling within the parking area and approaching the same south entrance/exit as if to exit onto 3300 South. (Tr. at 9, 65.) As the officers waited in

[2]Officer Wersland testified that although the vehicle he drives is unmarked, it is well-known in the area as the narcotics officers' vehicle. (Tr. at 9-10.)

the turn lane, they observed the red vehicle turn off its lights and then "abruptly" back up, traveling northbound through the parking lot in reverse "at a pretty high rate of speed." (Tr. at 10, 14, 66, 65.) The officers watched as the red vehicle continued to back up and then turn around in order to travel in a forward motion, through the parking area, in a different direction. (Tr. at 10.) At the same time as the red vehicle was turning around and heading north through the parking lot, the officers were able to turn left and enter the parking area. As the officers entered, they observed the red vehicle pull up to a small white vehicle which was facing south. The red and white cars were facing opposite directions and were positioned "driver-to-driver." (Tr. at 11.)

Officer Wersland observed the driver of the red vehicle reach out and exchange something with the driver of the white vehicle. (Tr. at 11.) Officer Wersland described the exchange as "very short" and "quick." (Tr. at 11.) Following this exchange, both the red car and the white car drove away in opposite directions. Officer Wersland testified that he had witnessed similar "exchanges" in drug transactions before. He testified that "oftentimes" cars will pull up driver-to-driver and engage in a quick exchange of money with narcotics. (Tr. at 30-31.) Additionally, Officer Lance testified that he had seen drug transactions occur in a similar manner. (Tr. at 67.) He testified that in his experience, "a lot of times drugs are exchanged kind of on the go that way." (Tr. at 67.) Both officers testified that, based on their experience and training, they thought the exchange they had witnessed was probably a drug transaction. (Tr. at 28, 67.)

Following the exchange, the red vehicle proceeded east, toward the entrance/exit on Main Street. Officer Lance testified that the red car was traveling at a "high rate of speed" for a parking lot or common driveway, causing him to be concerned about safety. (Tr. at 66.) Officer

Wersland testified that the red vehicle did not have it's headlights on and "was accelerating quickly." (Tr. at 11, 14.) Both officers noted that there were other people walking through the parking area. (Tr. at 11, 52, 74.)

At that point, Officer Wersland made the decision to stop the red vehicle. Both officers testified that there were many reasons for initiating the stop. These reasons included: the location, which was well-known for drug trafficking; the vehicle's unsafe driving pattern, which raised safety concerns; and the fact that the officers witnessed some sort of exchange which both of them thought was probably a drug transaction. (Tr. at 18, 67, 73.)

Officer Wersland activated his emergency lights and equipment to make the stop. (Tr. at 11.) The red car accelerated initially, creating"some distance," but then stopped just prior to reaching the exit onto Main Street. (Tr. at 12, 34, 54.) There were three individuals in the red vehicle at the time of the stop. (Tr. at 20.)

When the red vehicle stopped one of the passengers immediately exited the vehicle and began "speed-walking" toward, and tried to walk past, the officers. (Tr. at 68.) Officer Lance exited the police vehicle and encountered this passenger and focused his attention on this individual. (Tr. at 68-69.) Officer Wersland shouted to the driver of the red vehicle, later identified as defendant Cabrera, asking him to back up closer to the police vehicle. Cabrera complied. (Tr. at 16.)

Officer Wersland approached Cabrera, who remained in the driver's seat of the red vehicle. When Officer Wersland approached, he observed Cabrera use his left hand to put something in his mouth. (Tr. at 16.) Officer Wersland asked for a driver's license, registration and proof of insurance. (Tr. at 16.) Instead of immediately looking for and providing the

requested documents, Cabrera reached onto the floor, retrieved a can of Coke, opened the can and took a swallow. (Tr. at 17.) Officer Wersland testified that Cabrera "looked like you would when you're swallowing asprin" and Cabrera appeared to have swallowed whatever he had put in his mouth. (Tr. at 17.) Given the vehicle's driving pattern and the exchange the officers had just witnessed, Officer Wersland suspected that Cabrera might have swallowed narcotics. (Tr. at 23.) Cabrera then began looking for the requested documents and information. (Tr. at 17.)

Cabrera provided a Mexican driver's license and a vehicle registration certificate. (Tr. at 18.) Attempting to determine if there were any other licensed drivers in the vehicle, Officer Wersland asked the rear passenger, later identified as defendant Borquez, for his identification. Borquez also provided a Mexican driver's license. Although Officer Wersland acknowledged that a Mexican driver's license can be valid to drive in the United States, he also testified that it is his understanding that after a "certain amount of time" you must become a licensed driver. (Tr. at 19.) Officer Wersland further testified that in his experience, Mexican driver's licenses are often fabricated, and he did not believe these licenses to be authentic. (Tr. at 19, 20, 48.)[3] Officer Wersland asked dispatch to "run" the names listed on the Mexican driver's license documents. Dispatch reported that nothing came back on either individual; no licenses and no warrants.[4] (Tr. at 20.)

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[3]When pressed on cross-examination to specify, in his experience, what percentage of Mexican driver's licenses turn out to be false, Officer Wersland indicated approximately 98%. (Tr. at 48.) Officer Wersland also testified that in his 10-year career, he has seen only two legitimate green cards. (Tr. at 48.)

[4]Cabrera did provide a registration for the vehicle. The registration listed Cabrera and matched the name on the Mexican driver's license. (Tr. at 55.) Cabrera did not provide Officer Wersland with proof of insurance. (Tr. at 46.) Officer Wersland ran a "vehicle registration information" to determine the insurance status of the vehicle. The report indicated that insurance

Officer Wersland testified that he suspected drug activity based on several factors including: the unusual driving pattern of the red vehicle; the quick exchange between the red and while vehicles within the parking lot; the location of the transaction–a hotel parking lot where the officers had previously made numerous drug arrests; and the driver's action in putting something in his mouth upon the officer's approach and then swallowing the item before responding to the officer. (Tr. at 28.)

Because he had been unable to verify that there was a lawful and licensed driver for the vehicle,[5] and because he could not leave the vehicle in the parking lot, Officer Wersland decided to impound the vehicle pursuant to department policy. (Tr. at 20.) Officer Wersland asked the occupants to exit the vehicle. He patted them down for safety purposes to check for weapons and asked them to sit on a nearby curb. (Tr. at 21.) At that point, Officer Stevens arrived to provide assistance and to watch the vehicle's occupants while Officer Wersland proceeded with the vehicle inventory, listing property items found within the vehicle. (Tr. at 22.)

During the course of the inventory, Officer Wersland observed a large bundle of plastic bags underneath the driver's seat. (Tr. at 22.) Given his training and experience, Officer Wersland was aware that drugs are often packaged in such bags. Officer Wersland removed the bags and noticed that some sections had been "torn out." (Tr. at 22.) Officer Wersland suspected it was packaging for narcotics. (Tr. at 22.)

Officer Wersland testified that "because of the possible drug activity that we had seen, the

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was "not found." (Tr. at 60.)

[5]Officer Lance determined that the third occupant was not a licensed driver. (Tr. at 21, 71.)

possible drug exchange and the fact that I had suspected that Mr. Cabrera had swallowed narcotics on my approach to the vehicle . . . I called for a K-9." (Tr. at 23.)

Prior to the arrival of the K-9 unit, Officer Wersland took Cabrera aside and asked him if there were any drugs or illegal substances in the vehicle. (Tr. at 23.) Cabrera responded, "no." (Tr. at 24.) Officer Wersland then asked Cabrera about the item he had swallowed. Officer Wersland was aware, given his training and experience, that narcotics are sometimes packaged in what is called a "balloon" which can be swallowed. (Tr. at 24; 29-30.) Accordingly, Officer Wersland asked Cabrera if he swallowed some balloons when he approached. Officer Wersland testified that Cabrera responded, "yeah, I swallowed two balloons." (Tr. at 24.)

Officer Wersland did not advise Cabrera of his Miranda rights prior to this conversation. Officer Wersland testified that he did not advise Cabrera of his rights at that time because "he wasn't in custody at the time I suspected he had swallowed narcotics, I couldn't arrest him, I didn't have anything." (Tr. at 25.) Officer Wersland further testified "he wasn't in handcuffs . . . [and] other than us impounding the vehicle at that time he wasn't really in custody. So I didn't advise him of his rights." (Tr. at 25.) During the course of this conversation between Officer Wersland and Cabrera, there were three officers at the location. Officer Wersland was dressed in plain clothes, and although he was armed with a weapon, he testified that the weapon would not have been visible given his loose clothing. (Tr. at 56.)

As Officer Wersland was asking Cabrera about swallowing the narcotics the K-9 unit arrived at the location and Officer Jukes initiated the K-9 search. A few minutes into the K-9 search Officer Jukes instructed Officer Wersland to place the vehicle's occupants in custody. (Tr. at 25.) The K-9 search resulted in the seizure of narcotics and a firearm. At that point, the

defendants were handcuffed and placed under arrest. (Tr. at 25-28.)

The defendants filed a motion to suppress the evidence found within the vehicle and statements made to the officers. The defendants claim that the vehicle stop and subsequent detention were unlawful and in violation of the Fourth Amendment. In addition, defendant Cabrera claims that he was questioned without being advised of his rights per Miranda, also in violation of the Fourth Amendment.

DISCUSSION

A routine traffic stop is a seizure within the meaning of the Fourth Amendment. United States v. Botero-Ospina, 71 F.3d 783, 786 (10th Cir. 1995), cert. denied, 518 U.S. 1007 (1996). The reasonableness of such a stop is reviewed under a two-part test set forth in Terry v. Ohio, 392 U.S. 1, 20 (1968). Under that test, the court must make a dual inquiry asking first whether the officer's action was justified at its inception and second whether it was reasonably related in scope to the circumstances which justified the interference in the first place. United States v. Williams, 271 F.3d 1262, 1266 (10th Cir. 2001), cert. denied, 535 U.S. 1019 (2002).

I. The Initial Stop of Defendants' Vehicle

A traffic stop "is reasonable under the Fourth Amendment at its inception if the officer has either (1) probable cause to believe a traffic violation has occurred or (2) a reasonable articulable suspicion that 'this particular motorist violated any one of the multitude of applicable traffic and equipment regulations of the jurisdiction.'" United States v. Ramstad, 308 F.3d 1139, 1144 (10th Cir. 2002) (quoting United States v. Ozbirn, 189 F.3d 1194, 1197 (10th Cir. 1999)). It is irrelevant whether the particular officer would have stopped the vehicle under the general practice of the police department or whether the officer may have had other subjective motives

for stopping the vehicle. United States v. McRae, 81 F.3d 1528, 1533 (10th Cir. 1996). After careful review of the evidence in this case, the court concludes that the officers had ample justification for stopping the defendants' vehicle.

First, Officer Wersland stopped the defendants' vehicle after observing a pattern of unusual and unsafe driving. Both officers testified that the vehicle's headlights were switched from "on" to "off" while the vehicle remained in operation at approximately 10:00 p.m. The officers also observed the vehicle back up "abruptly" and travel in reverse at a "pretty high rate of speed." Officer Lance testified that when the vehicle turned around and proceeded in a forward motion, it continued to travel at an excessive rate of speed, causing him to be concerned about safety. Both officers noted that there were people and other vehicles in the area which caused them concern about the defendants' driving pattern. (Tr. at 73.)

Section 41-6-45 of the Utah Code Annotated prohibits reckless driving on the highways and elsewhere throughout the State of Utah. The statute specifically provides that "[a] person is guilty of reckless driving who operates a vehicle: (a) in willful or wanton disregard for the safety of persons or property." Id.; see id., § 41-6-11 (providing that the provisions of the Utah Traffic Code (Title 41, Chapter 6) refer exclusively to the operation of vehicles upon highways, except for sections 41-6-29 through 41-6-45, inclusive, which apply on highways and elsewhere throughout the state). Based on the facts recited above, the court concludes that the officers lawfully stopped the defendants' vehicle after they observed a pattern of reckless driving in violation of Utah law.

Second, in addition to the reckless driving, the officers' decision to stop the defendants' vehicle was supported by an objectively reasonable and articulable suspicion that illegal activity

had occurred or was occurring. United States v. Soto, 988 F.2d 1548, 1554 (10th Cir. 1993) (providing that an officer's "objectively reasonable articulable suspicion that illegal activity had occurred or was occurring" would justify stopping a vehicle); see also Terry, 392 U.S. at 29. This analysis turns on an objective assessment of the officers' actions in light of the facts and circumstances confronting him at the time. See Maryland v. Macon, 472 U.S. 463, 470-71 (1985).

The officers in this case were at a location well-known for its high incidence of drug trafficking. While at that location, they observed the defendants' engage in an unusual and suspicious driving pattern. The officers observed the defendants' vehicle extinguish its lights, which the officers perceived as an attempt to avoid detection, and then back up at a high rate of speed. The officers continued to watch as the defendants' vehicle engaged in a "quick" transaction with a second vehicle and then attempted to leave the parking area through a different exit, while traveling at a "pretty high rate of speed." Both officers, who have extensive training in drug interdiction, testified that they had witnessed similar exchanges in drug transactions on prior occasions, and both officers believed that the exchange they had just witnessed was a drug transaction. (Tr. at 28, 67.) Based on these facts, the court concludes that the officers had a reasonable suspicion that criminal activity had occurred or was occurring.

Accordingly, the traffic stop was justified at its inception.

II. Further Detention, Impound & Inventory

Having determined that the traffic stop of defendants' vehicle was justified at its inception, the court must ask "whether the officer's actions during the detention were reasonably related in scope to the circumstances which justified the interference in the first place." Terry,

392 U.S. at 20. The Supreme Court has made clear that "an investigative detention must be temporary, lasting no longer than necessary to effectuate the purpose of the stop, and the scope of the detention must be carefully tailored to its underlying justification." Florida v. Royer, 460 U.S. 491, 500 (1983).

"An officer conducting a routine traffic stop may run computer checks on the driver's license, the vehicle registration papers, and on whether the driver has any outstanding warrants or the vehicle has been reported stolen." United States v. Mendez, 118 F.3d 1426, 1429 (10th Cir. 1997). "The officer may detain the driver and his vehicle as long as reasonably necessary to make these determinations and to issue a citation or warning." United States v. Wood, 106 F.3d 942, 945 (10th Cir. 1997); United States v. Martinez, 983 F.2d 968, 974 (10th Cir. 1992), cert. denied, 507 U.S. 1056 (1993). However, once the computer checks confirm that the driver has produced a valid licence and proof of entitlement to operate the car, the driver must be permitted to proceed on his way, without further delay by police for additional questioning. United States v. Anderson, 114 F.3d 1059,1063-64 (10th Cir. 1997).

The case law makes clear that an individual may be detained until the officer is able to verify that the driver is lawfully entitled to operate the vehicle. In this case, because of the nature of the licenses provided by the defendants, Officer Wersland was unable to confirm or verify whether either defendant had a valid driver's license authorizing them to lawfully operate the vehicle. First, Officer Wersland was unable to confirm that the Mexican driver's licenses were authentic and valid Mexican documents, and based on his experience, he suspected they were not. Moreover, even if the Mexican driver's licenses were authentic Mexican documents, Officer Wersland was unable to verify whether they remained valid to operate a vehicle within the State

of Utah. Although Officer Wersland acknowledged that it is lawful to drive in Utah with a valid Mexican license for a certain period of time, he also testified that the privilege of using a Mexican driver's license within Utah is not unlimited. Officer Wersland testified that, because the vehicle had been appropriately registered to the driver, Cabrera, at a Utah address or residence, Officer Wersland suspected that the grace period for driving with a Mexican license in Utah had expired. A computer check did not show a valid driver's license for either defendant. Because the officers were unable to establish that there was a licensed driver for the vehicle, the court concludes that the officers acted reasonably in detaining the defendants and then proceeding to inventory and impound the vehicle. See United States v. Hunnicutt, 135 F.3d 1345, 1351 (10th Cir. 1998).

Moreover, in addition to the officers' inability to confirm that there was a licensed driver, the officers were justified in continuing to detain the defendants based on a reasonable suspicion of criminal activity. United States v. Villa-Chaparro, 115 F.3d 797, 801-02 (10th Cir.) ("An investigative detention may be expanded beyond its original purpose . . . if during the initial stop the detaining officer acquires reasonable suspicion of criminal activity, that is to say the officer must acquire a particularized and objective basis for suspecting the particular person stopped of criminal activity."), cert. denied, 522 U.S. 926 (1997). The standard for evaluating whether an officer could have had a reasonable suspicion of illegal activity is an objective one. See id. at 802. Whether the subsequent detention is supported by reasonable suspicion of illegal activity does not depend upon any one factor but on the totality of the circumstances. United States v. Soto, 988 F.2d 1548, 1555 (10th Cir. 1993). By definition, the totality of the circumstances includes all circumstances known to the officer at the time, as well as reasonable inferences and

conclusions that may be drawn by the officer. Moreover, in determining reasonableness, the officer's conduct should be viewed with "'common sense' considering 'ordinary human experience.'" Villa-Chaparro, 115 F.3d at 801 (quoting United States v. Sharpe, 470 U.S. 675, 685 (1985)).

With these principles in mind, the court considers the evidence presented in this case. As explained in greater detail above, both Officer Wersland and Officer Lance have extensive training and experience in drug investigation and drug interdiction. Both Officer Wersland and Officer Lance testified that they had suspicion of illegal drug activity associated with the defendants' vehicle, based on several observations. First, as set forth previously, the officers observed an unusual and suspicious driving pattern which involved turning off the vehicle's headlights and then driving in reverse through the parking area. Second, the officers watched the vehicle engage in a quick exchange with another vehicle in the parking area. Although the officers were unable to identify precisely what had been exchanged, based on their experience in working narcotics cases, the officer suspected it was probably a drug transaction. Third, when the officers activated their emergency lights, the defendants' vehicle initially accelerated and took longer to stop than normal. See Hunnicutt, 135 F.3d at 1349 (providing that reluctance to stop can be a consideration in the totality of the circumstances analysis of reasonable suspicion). Fourth, the officers knew from prior experience that this was a high crime area, with a high incidence of drug trafficking, and they had specific knowledge of numerous arrests made for drug possession and distribution at that location.

In addition, upon approaching the vehicle following the stop, Officer Wersland made further observations which contributed to his reasonable suspicion of criminal activity. An

officer's determination of reasonable suspicion may be based on both facts known upon making the stop, and those learned during the course of the stop. United States v. Oliver, 363 F.3d 1061, 1067 (10th Cir. 2004). In this case, upon approaching the vehicle, Officer Wersland noted Cabrera's unusual behavior in placing something in his mouth and then taking the time to open a can of Coke and swallow the object before responding to the officer's requests. Given the course of events leading up to that point, Officer Wersland suspected that Cabrera might have swallowed narcotics. (Tr. at 23.) Finally, the occupants were unable to establish that they were legally permitted to operate the vehicle. In the context of a traffic stop, courts have concluded that driving without a valid driver's license may support a finding of reasonable suspicion. See United States v. Garcia, 52 F. Supp. 2d 1239, 1250-51 (D. Kan. 1999); see also United States v. Hunnicutt, 135 F.3d 1345, 1349 n.1 (10th Cir. 1998) (suggesting that in the context of a traffic stop, driving on a suspended license is a factor supporting reasonable suspicion). As explained in detail above, this circumstance alone would have justified a limited detention to ensure the vehicle was being operated by a person with a valid license.

Based on the totality of the circumstances presented in this case, the court concludes that the officers had a reasonable articulable suspicion of criminal activity sufficient to detain the vehicle and its occupants, ask additional questions and subject the vehicle to a K-9 search.

III. Miranda

"It is well established that 'police officers are not required to administer Miranda warnings to everyone whom they question.'" United States v. Erving L., 147 F.3d 1240, 1246 (10th Cir. 1998) (quoting Oregon v. Mathiason, 429 U.S. 492 (1977)). Instead, the warnings mandated by Miranda apply only to "statements obtained from an individual who is subjected to

custodial police interrogation." Miranda v. Arizona, 384 U.S. 436, 439 (1966); see United States v. Perdue, 8 F.3d 1455, 1463 (10th Cir. 1993) (providing that the requirement of a Miranda warning is triggered by custodial interrogation, that is, the suspect must be in custody, and the questioning must meet the legal definition of interrogation); see also Illinois v. Perkins, 496 U.S. 292 (1990) (Miranda requirement comes into play only when there is both custody and interrogation).

In Berkemer v. McCarty, 468 U.S. 420 (1984), the Supreme Court held that a suspect is not "in custody" for purposes of Miranda unless his "freedom of action is curtailed to a 'degree associated with formal arrest.'" Id. at 440 (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam)). "The proper perspective for determining whether a suspect is in custody at the time of questioning is whether 'a reasonable [person] in the suspect's position would have understood his situation ... as the functional equivalent of formal arrest.'" Erving L., 147 F.3d at 1246-47 (quoting Berkemer, 468 U.S. at 442). Berkemer's "reasonable person" does not have a guilty state of mind and does not have peculiar mental or emotional conditions that are not apparent to the questioning officer. Id. at 1247; see United States v. Sanchez, 89 F.3d 715, 718 (10th Cir. 1996) (noting that law's reasonable person is innocent); United States v. Little, 18 F.3d 1499, 1505 (10th Cir. 1994) (en banc) ("[T]he particular personal traits or subjective state of mind of the defendant are irrelevant to the objective 'reasonable person' test ... 'other than to the extent that they may have been known to the officer and influenced his conduct.'" (citation omitted)).

The fact that the defendant Cabrera was being detained at the time of his questioning, while relevant, is not outcome determinative. The Tenth Circuit has explicitly provided that although a traffic stop or detention is a "seizure" under the Fourth Amendment, "a Fourth

Amendment seizure does not necessarily render a person in custody for purposes of Miranda." United States v. Hudson, 210 F.3d 1184, 1191 (10th Cir. 2000); see also Cordoba v. Hanrahan, 910 F.2d 691, 693 (10th Cir. 1990) (providing that a routine traffic stop for roadside questioning does not sufficiently impair person's free exercise of privilege against self-incrimination to warrant Miranda warning).

Rather, the determination of "custody" involves a fact-intensive inquiry and an examination of the totality of the circumstances. United States v. Griffin, 7 F.3d 1512, 1518 (10th Cir. 1993). Although there are no "hard line rules," the Tenth Circuit has identified the following factors as "useful in testing the atmosphere of custody." Id. (listing factors but cautioning that the factors should not be interpreted as an "exhaustive pronouncement"). First, the extent to which the suspect is aware that he is free to refrain from answering questions or end the interview may contribute to a custodial setting. A second factor which may be indicative of a custodial setting is the nature of the questioning. While Terry type investigations allow for limited questioning to confirm an officer's suspicions, prolonged accusatory questioning is likely to create a coercive environment. A final factor commonly examined is whether there was a "police dominated atmosphere." These circumstances might include: separation of the suspect from family or friends who would offer moral support; isolation in nonpublic questioning rooms; threatening presence of several officers; display of a weapon by an officer; physical contact with the subject; an officer's use of language or tone of voice in a manner implying that compliance with the request might be compelled. Id. at 1518 (citations omitted).

Applying these principles to the facts of this case, the court concludes that the actions of the officers would not have caused a reasonable person in Cabrera's position to believe that his

liberty was restrained to the degree associated with formal arrest. The defendants in this case were detained on a traffic stop and, based on a reasonable suspicion of drug trafficking, were further detained until a K-9 unit could check the vehicle. The defendants were asked to step out of the vehicle and sit on the curb. The defendants were not placed in a police vehicle nor were they separated from each other. The defendants were not handcuffed, nor were they prevented from talking to each other or anyone else.

At the time of Cabrera's questioning, the officers had not found any drugs. Officer Wersland's question to Cabrera, inquiring as to what he had swallowed, was akin to Terry-type questioning and was an attempt to "obtain information which would confirm or dispel his suspicion" that a crime had occurred. See Cordoba, 910 F.2d at 693 (providing that during a routine traffic stop, police officer may ask detainee moderate number of questions to try to obtain information confirming or dispelling officer's suspicion that a crime or traffic violation has occurred); see also Terry v. Ohio, 392 U.S. 1 (1968). There is nothing in the record to indicate that Officer Wersland engaged in prolonged or accusatory questioning.

Finally, the environment was not police dominated. Although there were three officers present at the time of the questioning, each officer was attending to various responsibilities. Officer Wersland, the officer responsible for questioning Cabrera, was dressed in plain clothes. Although he was armed with a weapon, he testified that the weapon would not have been visible given his loose clothing. Additionally, the detention occurred in a public area, and the officers' actions were in view of the passing public. Finally, the officers appeared to have been courteous and non-threatening. There was no evidence of any physical contact and nothing in the record to suggest that the officers adopted a threatening posture or made a show of force.

Accordingly, because Cabrera was not in custody at the time his statements were made, the statements are admissible despite the lack of Miranda warning.

Therefore, based on the foregoing and good cause appearing, IT IS HEREBY ORDERED that defendants' motion to suppress is DENIED.

DATED this 21st day of July, 2004

BY THE COURT:

David K. Winder
Senior District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2004, I served copies of the foregoing by United States mail, postage prepaid, and/or by inter-office delivery, addressed as follows:

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United States District Court
for the
District of Utah
July 21, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cr-00164

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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